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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

# UNITED STATES

CASE NO. 4:22-cr-6040-SAB-1

Plaintiff,

V.

ANDREI S. BORGHERIU,

UNITED STATES' RESPONSE TO  
MOTION IN LIMINE "TO  
CONFORM THE GOVERNMENT'S  
CASE TO PRIOR ORDERS" (ECF  
No. 116)

February 10, 2025 at 9:30 a.m.  
Richland, WA- With Oral Argument

The United States of America, by and through Vanessa R. Waldref, United States Attorney for the Eastern District of Washington, Frieda K. Zimmerman and Jeremy J. Kelley, Assistant United States Attorneys, respectfully submits this response to Defendant's Motion in Limine to Conform the Government's Case to Prior Orders (ECF No. 116). Despite being styled as a request to require the United States to conform with prior orders of the Court, Defendant's Motion is an attempt to relitigate issues the Defense previously lost. As Defendant's motion requests that the United States be prevented from presenting factually accurate testimony that the Court has already concluded is admissible, this motion should be denied.

1                   DISCUSSION

2                   The Indictment charges that Defendant lied to the SBA to obtain nearly half a  
3 million dollars in economic injury disaster loan (“EIDL”) proceeds when he falsely  
4 and fraudulently certified to the SBA, on his Loan Authorization and Agreement for  
5 the EIDL, that he would only use the EIDL proceeds solely as “working capital to  
6 alleviate economic injury.” ECF No. 1 at 5.

7                   The United States provided notice that it intended to solicit testimony from  
8 Mr. Ray Brown, an employee with the SBA who has extensive experience with the  
9 EIDL Program. ECF No. 26. The Defense moved to exclude testimony from Mr.  
10 Ray Brown. ECF No. 29. This Court denied the motion, concluding that “Mr.  
11 Brown’s testimony is reliable, given his experience, and is relevant because it goes  
12 to an element of the crime of wire fraud, specifically, that Defendant’s statements  
13 made as part of the scheme were material.” ECF No. 85 at 5. The Court also noted  
14 that “his testimony about the workings of the EIDL program is not being proffered  
15 as expert testimony, but as testimony under Rule 701.” ECF No. 85 at 4.

16                  On Defendant’s behalf, the Defense proffered the testimony of Janet McHard,  
17 a forensic account. ECF No. 54, 91. The United States moved to exclude the  
18 proffered testimony, ECF Nos. 56, 94, and after careful consideration, Ms.  
19 McHard’s testimony was excluded by the Court. ECF No. 100. The Court concluded  
20 that Ms. McHard’s “qualifications do not match the issues to which her opinions are  
21 being offered.” ECF No. 100 at 2. The Court further stated that while Ms. McHard  
22 is qualified as a forensic accountant and certified fraud examiner, the opinions  
23 proffered were not relevant and would not be helpful to the jury. ECF No. 100 at 1,  
24 2.

25                  Several months later, the Defense moved for reconsideration of the Court’s  
26 order granting the United States’ motion to exclude Ms. McHard, contending that  
27 the exclusion denied Defendant his due process right to present a defense. ECF No.  
28 105 at 3. The Court denied his motion, indicating “[t]here is no constitutional right

1 to present testimony of an unqualified expert.” ECF No. 106 at 3. ECF No. 106 at 3.

2 As the Defense points out in its motion, the Court made these rulings based  
3 upon “relevance and foundation considerations.” ECF No. 116 at 3. The Court  
4 concluded that, on one hand, Mr. Brown had an adequate foundation to offer his  
5 proffered testimony and that it would assist the jury in determining a fact of  
6 consequence, ECF No. 85, and concluded that, on the other hand, Ms. McHard did  
7 not have an adequate foundation to offer her proffered testimony and that such  
8 testimony would not assist the jury in determining a fact of consequence. ECF No.  
9 100. Having lost arguments to the contrary on numerous other occasions, the  
10 Defense now tries to conflate the relevance and evidentiary foundations for these  
11 witnesses, which are distinct and separate, and which have been extensively  
12 reviewed previously by the Court.

13 The Defense argues that since the Court excluded Ms. McHard’s testimony  
14 generally discussing irrelevant matters and providing unreliable, unfounded  
15 opinions, Mr. Brown should somehow not be allowed to offer general testimony  
16 regarding the specific federal program the Defendant is charged with defrauding.  
17 This is nonsensical. Defendant’s latest motion an additional attempt to relitigate this  
18 already-decided issue. The United States has already set forth for the Court the  
19 various reasons that Ms. McHard’s testimony is inappropriate, ECF Nos. 56, 61, 94,  
20 and that Mr. Brown’s testimony is admissible and relevant, ECF No. 34. The Court  
21 considered this briefing, along with Defendant’s briefing, and has issued three orders  
22 regarding such proffered testimony—specifically that Mr. Brown had a sufficient  
23 foundation to testify and offered relevant testimony and that Ms. McHard did not  
24 have a sufficient foundation to testify and offered irrelevant and unhelpful testimony.  
25 ECF Nos. 85, 100, 106.

26 In making these arguments, Defense counsel fails to appreciate the distinction  
27 between the Court’s orders regarding two separate and distinct witnesses. For  
28 example, Defendant fails to appreciate the distinction between testimony offered by

1 an individual (Mr. Brown) with extensive familiarity with the SBA’s EIDL program  
2 and testimony offered by an individual (Ms. McHard) with no specific personal  
3 knowledge of the EIDL program or any other topic on which she was offered as a  
4 witness. The Defense further fails to appreciate the distinction between  
5 circumstantial evidence that can be used to infer Defendant’s knowledge and intent  
6 at the time he applied for and obtained EIDL funds, such as the EIDL program rules  
7 that Defendant agreed to follow in submitting the loan documents, and pure  
8 speculation offered by a third party without foundation as to what “may” have been  
9 going on at the time Defendant submitted the EIDL documents. *See e.g.*, ECF No.  
10 91 at 7 (“She will discuss, for example, how equipment, assets, and resources may  
11 become unavoidably commingled or used for more than one purpose.”); 9 (“Ms.  
12 McHard will opine that an EIDL may have been more expensive for Mr. Borgheriu  
13 than other types of financing for the Sunshine property.”).<sup>1</sup> The two witnesses have  
14 different professional experience and offer different testimony, and there is no basis  
15 to conflate the two.

16 Nevertheless, in requesting the Court to, yet again, reconsider the testimony  
17 of Mr. Brown and Ms. McHard, the Defense contends that “a fair trial means  
18 evidentiary limitations apply equally to both parties.” ECF No. 116 at 4. This is  
19 absolutely correct, and those limitations are set forth in the Federal Rules of  
20 Evidence, which this Court has considered in reaching its conclusions as to the  
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22 <sup>1</sup> To the extent Defendant argues that the EIDL documents are not clear about the  
23 rules of the EIDL program, this is something he can explore in cross-examining a  
24 witness with knowledge of that program and its documents (Mr. Brown) or through  
25 Defendant’s own testimony about his actual understanding of the program and intent  
26 at the time he applied for the funds. As the Court has ruled multiple times, Ms.  
27 McHard’s proffered testimony about these topics is without foundation, is  
28 speculative, and is irrelevant.

1 relevance and admissibility of each witness's proffered testimony. Defendant  
2 simply failed to carry his burden to show the admissibility of Ms. McHard's  
3 proffered testimony under those Rules while the United States succeeded in carrying  
4 its burden under the same Rules. Indeed, Defendant makes no specific argument in  
5 his motion about these Rules, and the Court's application of them to each witness,  
6 but simply asks the Court to conflate the testimony of Mr. Brown and Ms. McHard  
7 and nonsensically apply its order regarding one specific witness to an entirely  
8 separate witness, rather than examine each witness independently for foundation and  
9 relevance, which the Court has already done numerous times. The motion offers no  
10 basis for the Court to reconsider its orders regarding these witnesses a third time.

11 In compliance with prior orders, the United States intends to present testimony  
12 from Mr. Brown, which the Court has specifically evaluated and concluded to be  
13 relevant and admissible. ECF No. 85. The United States has no intention to call Ms.  
14 McHard, whose testimony the Court has also specifically evaluated and concluded  
15 is irrelevant and inadmissible. ECF Nos. 100, 106. Defendant's motion should be  
16 denied.

17 Dated this 22<sup>nd</sup> day of January, 2025.

18  
19 Respectfully submitted,

20 VANESSA WALDREF  
21 United States Attorney

22 /s/Frieda K. Zimmerman  
23 Frieda K. Zimmerman  
24 Jeremy J. Kelley  
Assistant United States Attorney

1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on January 22, 2025, I electronically filed the foregoing  
3 with the Clerk of the Court using the CM/ECF system which will send notification  
4 of such filing to noticed counsel.

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9                   */s/Frieda K. Zimmerman*

10                  Frieda K. Zimmerman  
11                  Assistant United States Attorney

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